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No.

In the Supreme Court of the United States

October Term, 1991

WAYNE HUNTSMAN and
RALPH HUNTSMAN,
Petitioners,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the United States have the statutory authority to appeal from a judgment of acquittal in a criminal case entered notwithstanding the verdict when the district court determined that the evidence adduced at trial was insufficient to support conviction?

2. In the case involving the alleged fraudulent receipt of "deficiency payments" under the Agricultural Act of 1949, as amended, may a conviction be based on the alleged failing of Petitioners to comly with a contractual provision which is not part of the statute, has not been properly adopted as part of the Code of Federal Regulations and is, in fact, inconsistent with relevent provisions of the C.F.R., and was not mentionee bill of particulars filed pretrial by the Government?

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OPINIONS OF THE COURTS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported as *United States v. Huntsman*, 959 F.2d 1429 (8th Cir. 1992), *Appendix A*. The order of the Court of Appeals denying the Petition for Rehearing entered on May 1, 1992 is not reported, *Appendix B*. The order of the United States District Court for the Eastern District of Arkansas, dismissing the case on post verdict motion, is not reported, *Appendix C*. Each of the opinions appear in the *Appendix* to this Petition.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Eighth Circuit was entered on March 26, 1992. The order denying the Petition for Rehearing was entered on May 1, 1992, and this Petition is filed within 90 days of that date as required by Supreme Court Rule under 28 U.S.C. §1254(1). This Court has jurisdiction of this matter under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On December 13, 1988, a grand jury sitting in the United States District Court for the Eastern District of Arkansas returned a seven count indictment charging the Petitioners, Wayne and Ralph Huntsman, with making and causing others to make false statements to the Commodity Credit Corporation ("CCC") for the purpose of obtaining money from the Rice Diversion and Deficiency Program ("Program"). Under the Program, subsidy payments are paid to rice farmers if the market price falls below a predetermined target level.

Count I charged Petitioners, who are brothers, with a conspiracy whereby they induced several tenant farmers (hereinafter referred to as "farmers") to sign contracts with the CCC in which they stated they were "producers," when, in fact, Huntsman Farm, Inc. was the true "producer." The indictment charged that through this process the Petitioners hoped to circumvent the "'separate person' requirement for entitlement to benefits," all in violation of 15 U.S.C. §714m(d).

Counts II through VII of the indictment charged the Petitioners with causing four individual farmers to falsely represent themselves as "producers" for the purpose of influencing the action of the CCC in violation of 15 U.S.C. §714m(a).

Prior to trial, Petitioners demanded a bill of particulars, seeking, *inter alia,* the nature of the "false statements" they were alleged to have caused the farmers to make and the precise regulations the government was relying upon. The Government responded in a Bill of Particulars *(Appendix E)* by stating that Petitioners had

made false statements to circumvent the requirements found in 7 C.F.R. §795.3 (1987) that limits subsidy payments to "separate persons." The Bill of Particulars further stated that the Food Security Act of 1985 amended the Agriculture Act of 1949 to limit the total amount of Department of Agriculture subsidy payments to $50,000 per "person" each year.

The case proceeded to a jury trial before District Judge G. Thomas Eisele. Although the evidence adduced at trial was contradictory and inconsistent, taking the evidence most favorably to the Government, it was shown that the Petitioners were the sons of Maudie and Harold Huntsman who owned an 18,000 acre farm in White County, Arkansas, known as Huntsman Farm, Inc. ("HFI"). In 1984 and 1985, HFI participated in the Program administered by the CCC through the Agricultural Stabilization and Conservation Service (ASCS). The Petitioners suggested that the four farmers sign up to receive deficiency payments under the Program. Each of the farmers had a valid lease with HFI and arranged their farming so as to comply with the separate "person" provisions of the regulations. Each farmer was required to sign a contract with CCC which indicated each was a "producer."

The bulk of the incriminating evidence came through statements the farmers gave to Government investigators prior to indictment. At trial the farmers contradicted, repudiated, or denied many of the statements attributed to them. However, the jury could have concluded that the farmers signed the contracts but did not actually grow the rice or assume any of the costs of productional. The rice was actually grown by Petitioners or third parties under Petitioners' direction. The Government's

theory was that Petitioners undertook this scheme so they could collect more than the $50,000 limitation established by statute for each separate "person."

When the farmers received the Government payments, they paid the funds to HFI. Although the prosecution contended that these payments demonstrated that the leases were "shams," the Petitioners adduced substantial evidence that the fair rental value of the property or other debts owed HFI by the farmers approximately equaled the amounts of the deficiency payments. It was Petitioners[1] position that the payments to HFI from the farmers were fair payment for rentals, equipment, or services.

On this evidence, the jury acquitted the Petitioners of the conspiracy count, but convicted the Petitioners on each substantive count.

Petitioners filed extensive post-verdict motions. Judge Eisele concluded that Petitioners were entitled to acquittal for two reasons *(Appendix C)*. First, the District Court found that although the Petitioners were indicted for causing the farmers to misrepresent themselves as "producers," at trial the Government's case was directed as showing that the Petitioners had circumvented the

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[1]However, it must be emphasized that under applicable regulations there is no requirement that the "producer" actually do the farming. The "producer" can hire a third party to do the actual labor and not lose his status as a farmer, 7 C.F.R. § 795.16. The District Court found that the jury was "misled by arguments of the government leading them to believe that only 'hands on' farming would meet the test" for a "producer," Appendix C.

separate "person" regulations. The District Court thus found that there was a fatal variance between the crime charged in the indictment and the proof at trial. For this reason, the Petitioners were entitled to post verdict relief.

Secondly, Judge Eisele found that the evidence did not sustain the conviction. Judge Eisele concluded that the evidence showed that the farmers were "producers" and thus the evidence was insufficient to prove that the Petitioners had caused the farmers to make a false statement. The District Court thus entered a Judgment of Acquittal on all counts *(Appendix C)*.

The Government filed a Notice of Appeal. Petitioners moved the Eighth Circuit to dismiss the appeal, asserting both that the United States lacked the statutory authority to appeal in a case in which the district court enters an acquittal based on insufficiency of the evidence and because the appeal was barred by the Double Jeopardy Clause of the Fifth Amendment. The motion to dismiss was denied.

On March 26, 1992, a panel of the United States Court of Appeals for the Eighth Circuit reversed the judgment of acquittal and ordered the jury verdict reinstated. The Court concluded that there was no variance between the indictment and the proof. The Court found:

> The indictment alleged the false statements to be the tenants' representations of themselves as producers. The proof tended to show that they were not producers. The jury instructions on

Counts II through VII conformed to these charges, noting that the statements at issue were Long's, Crowder's, Mason's, and Parks' representations that they would be producers. Since the material elements addressed in the proof and in the jury instructions matched those charged in the indictment, the indictment was not amended.

Similarly, we perceive no fatal variance. As described above, the indictment put Wayne and Ralph Huntsman on notice that the prosecution would try to prove that the four tenants misrepresented their status as producers when each signed the Contract to Participate. The evidence offered by the government conformed to these charges. It tended to show that Long, Crowder, Mason and Parks represented themselves as producers when each signed the Contract. The evidence also tended to show that the statements were false because none of the four qualified as producers entitled to share in the crops, either because they would not farm the leased land or have it custom farmed for them, [FN4] or because they would not share in the risks and benefits of farming the land because Wayne and Ralph Huntsman would manipulate the transactions. We therefore conclude that the facts proved at trial did not materially vary from those alleged in the indictment. *(Appendix A14-15).*

The Court also rejected Judge Eisele's conclusion that the evidence did not sustain the conviction. The panel found that since the farmers never intended to share in the crop proceeds or to farm, they were not "producers" *(Appendix A)*.

On May 1, 1992, the Eighth Circuit denied Petitioners' request for rehearing.

Wayne and Ralph Huntsman now ask this Court to review the judgment of the Court of Appeals.

REASON FOR GRANTING WRIT

I

THIS COURT SHOULD GRANT THE INSTANT WRIT TO CONSIDER WHETHER THE GOVERNMENT HAS THE STATUTORY AUTHORITY TO APPEAL FROM A JUDGMENT OF ACQUITTAL ENTERED FOLLOWING A JURY VERDICT FINDING PETITIONERS GUILTY.

A. This Case Raises a Question of First Impression for the Court.

The jury convicted the Petitioners of various substantive offenses. In post verdict motions the District Court found that the evidence adduced at trial was insufficient to convict the Petitioners. The District Court entered judgments of acquittals from which the Government appealed. Petitioners moved the Court of Appeals to dismiss the Government's appeal.[2] The Eighth Circuit denied that motion, citing this Court's decision in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), Slip opinion, p. 10, n. 2, *Appendix A.*

Petitioners ask that this Court reconsider the *dicta* in *Martin Linen* and determine whether the prosecution has the *statutory* right to appeal a judgment of acquittal notwithstanding the verdict entered when the district

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[2]Before the Court of Appeals Petitioners advanced both a constitutional and statutory argument in support of their dismigsal motions. In this Court Petitioners press only their contention that the Government lacks the statutory authority to appeal.

judge concludes that the evidence adduced at trial is not sufficient to support conviction.

This Court has never specifically considered whether a prosecution appeal is authorized under these precise circumstances. In *United States v. Wilson*, 420 U.S. 332, 336-339 (1975), the Court held that 18 U.S.C. §3731 allowed the Government to appeal from the dismissal of an indictment entered after a guilty verdict, based on the delay between the offense and the time of indictment. Later, in *Martin Linen Supply*, the Court ruled that this same statute authorized an appeal from a judgment of acquittal entered after the jury was unable to reach a verdict, 430 U.S. at 568. In both *Wilson* and *Martin Linen Supply* the Court asserted that the Government now has the right to appeal in a criminal case unless barred by the Double Jeopardy Clause of the Fifth Amendment to the Constitution. In *Martin* Justice Stevens specifically disagreed with the majority and concluded that the Government's right to appeal was not coextensive with the Double Jeopardy Clause and that Government appeals from acquittals are not allowed, *United States v. Martin Linen Supply Co.*, 430 U.S. at 576-583 (Stevens, J., *concurring*).

For the reasons that follow, Petitioners ask this Court to reconsider the *dicta* in *Wilson* and *Martin Linen Supply* and find that the Government's appeal in this case is not authorized under the present circumstances.

B. The Government's Right to Appeal Must be Explicit, and Does Not Extend to Appeals from Judgments of Acquittal Based on a Factual Finding that Petitioners are Not Guilty.

A century ago this Court made clear that the

Government has no common law right to appeal in a criminal case, and that any such appeal must be expressly provided by statute, *United States v. Sanges*, 144 U.S. 310 (1892). This rule was reiterated in *Wilson* and again *in Martin Linen Supply*. It is thus necessary to consider the precise words of the statute which authorizes prosecution appeals in criminal cases, 18 U.S.C. §3731. As relevant to this case, the statute provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

It at once becomes clear that the statute does not authorize appeal in every case allowed by the Double Jeopardy Clause. The statute could have been drafted to so provide, but it limits appeal to certain types of orders. For the Government to appeal there must first be an order or judgment "dismissing an indictment or information or granting a new trial." That is the express jurisdictional authority afforded by the words of the statute.

"In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished," *Estate of Floyd Cowart v.*

Nicklos Drilling Company, — U.S. —, 60 U.S.L.W. 4692, 4694 (6/22/92). This Court "must give effect to the plain language of the statute unless there is good reason to believe Congress intended the language to have some more restrictive meaning," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). This is particularly true when the Court is considering a jurisdictional statute which must be construed with precision, *Cheng Fan Kwok v. Immigration and Nat. Serv.*, 392 U.S. 206, 212 (1968). When considering the meaning of a procedural statute, the Court should "stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy," *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946).

Applying these basic rules to the instant case, 18 U.S.C. §3731 does not authorize an appeal from a judgment of acquittal. Such authority is simply not in the statute. The statute enumerates the various types of orders from which the prosecution might appeal, and no mention is made of appealing from an acquittal entered notwithstanding the verdict after the jury has returned a guilty verdict. The judgment of acquittal is a determination that the facts presented do not establish the Government's case. It is not an order dismissing the indictment and it is certainly not an order granting a new trial. The statute on its face does not authorize the Government's appeal.

C. The Legislative History Does Not Support the Government's Appeal from a Judgment of Acquittal.

In *Martin Linen Supply* this Court referred to the legislative history discussed in *Wilson* to find that Congress intended that the Government has the authority

to appeal in a criminal case whenever such appeal would not contravene the Fifth Amendment, 430 U.S. at 568. In *Wilson* this Court relied on a most ambiguous series of legislative modifications to conclude that Congress intended to expand the scope of the Government's appeals to be coextensive with the Constitutional right of prosecution appeals. However, as Justice Stevens conclusively demonstrated in his concurring opinion in *Martin Linen Supply,* the legislative history is replete with evidence that Congress never intended to authorize Government appeals from acquittals.

The sponsor of the bill said that the proposed statute "provides that the Government has the right to appeal any ruling by a district court in a criminal case which dismisses a prosecution in favor of a defendant *except where the ruling is an acquittal,"* 116 Cong. Rec. 35659 (statement of Senator Hruska) (emphasis added). Senator Hruska spread upon the record a letter from then Solicitor General Erwin N. Griswold who explained that the proposed statute allowed the Government "an appeal from any dismissal except one amounting to a 'judgment of acquittal', " i.e., a factual judgment that the defendant is not guilty of the crime charged...," ibid.

Both the House and Senate understood that appeals from judgments of acquittals were not allowed under the statute, but in the ultimate conference committee the language in the Senate bill explicitly prohibiting appeals from judgments of acquittals was deleted. Also deleted was language from the House bill which would have explicitly allowed appeals from <u>any</u> orders "terminating a prosecution in favor of a defendant." As Justice Stevens pointed out, the deletion of the quoted language rendered superfluous and unnecessary the exceptions for

acquittals contained in the Senate bill, *see,* 430 U.S. at 580 (Stevens J., *concurring*).

There is nothing in the conference report to suggest that the change in language was intended to expand the Government's right to appeal to include appeals from judgments of acquittals. In *Wilson* Justice Marshall speculated that Congress believed that the Double Jeopardy Clause of the Fifth Amendment prohibited appeals from all acquittals, thus explaining the restrictions in the original bill and in the debates. Whether or not Justice Marshall was correct, the fact remains that the *statute* does not authorize the appeal from an acquittal. Whether this was the result of a misunderstanding of constitutional law on the part of Congress or not, the Government's right to appeal must be express, and it is not. Even if the members of Congress thought they were expanding the prosecution's right to appeal to extent allowed by the Constitution, they did not do that in the legislation. The statute explicitly limits the circumstances in which such an appeal may be taken. It is difficult to understand how a misunderstanding of constitutional law could translate into an expansion of federal jurisdiction to hear appeals which are not allowed by the statute. Certainly the legislative history is not so clear on this point as to allow the Court to ignore the plain words of the statute in the manner suggested by *Wilson* and *Martin Linen Supply*.

Petitioners submit that the issue presented is ripe for reconsideration by this Court. They ask that certiorari be granted to consider the question.

II.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THEY WERE INDICTED FOR FAILING TO MEET THE REQUIREMENTS OF A SPECIFIC STATUTE AND REGULATION, BUT WERE CONVICTED BASED ON A CONTRACT PROVISION WHICH IS NOT PART OF THE STATUTE AND IS ACTUALLY INCONSISTENT WITH APPLICABLE REGULATORY PROVISIONS.

A. Petitioners are Convicted of Different Offense than that for which they were Indicted.

Petitioners were indicted on six counts of causing false statements to be made to the Agricultural Stabilization and Conservation Service for the purpose of obtaining improper payments under the Rice Diversion and Deficiency Program administered by the Commodity Credit Corporation. Specifically, the indictment charges that the Petitioners caused the tenant farmers to sign contracts signifying that they were "producers" when, in fact, HFI was the producer. In the Bill of Particulars, however, *(Appendix E)* the Government indicated that the Petitioners had attempted to "circumvent the definition of the term 'person' found in the Code of Federal Regulations. ... 7 C.F.R. §795.3" (1987). The Bill of Particulars went on to explain that the applicable statutes limit the total amount of subsidy payments each "person" could receive to $50,000 per year.

At the beginning of trial, however, the U.S. Attorney proffered to defense counsel a series of contracts between the Commodity Credit Corporation (CCC) and the farmers. Each named individual signed his name in the

box marked "Producer." The contract provided that "the operator and each producer on the farm and CCC agree to comply with the terms and conditions specified in the Appendix" to the contract. The appendix provided a definition for the term "producer." At trial and on appeal the Government's position was that Petitioners were guilty because they caused other persons to sign the contracts as "producers," when they were not "producers" under the definition found in the appendix to the contracts.

There is no provision in either the statute or regulation limiting payments to "producers." In fact, the Agriculture Security Act of 1985, codified as 7 U.S.C. §1308(1)(A), limits payment to separate "persons" and makes no mention of payments to "producers." The definition of "producer" included in the contract between the farmers and the CCC is found neither in the statute nor in the applicable regulation. Petitioners contend that it was improper for the Government to expand the scope of a criminal statute by reference to a definition in a contract which has never been adopted by either statute or proper regulation. Furthermore, it was a violation of Due Process of Law, and a fatal variance from the indictment, for the Government to give notice that Petitioners had violated the separate "person" regulation but then base the prosecution on a provision in the contract in which the farmers allegedly referred to themselves as "producers."

B. *The Prosecution Improperly Expanded* the *Scope of Petitioners' Criminal Liability by Reference to a Contract Provision that is Found in Neither* the Statute *nor Regulation.*

In the Bill of Particulars, the Government informed Petitioners that they were charged with attempting to circumvent the separate person provisions of the Code of Federal Regulations, 7 C.F.R. § 793.3 (1987), now found as 7 C.F.R. § 795.3(b). This regulation provides:

> Subject to the provisions of this part, the term "person" shall mean an individual, joint stock company, corporation, association, trust, estate, or other legal entity. In order to be considered to be a separate person for the purposes of this part with respect to any crop, in addition to any other provision of this part, an individual or other legal entity must:
>
> (a) Have a separate and distinct interest in the crop or the land on which the crop is produced;
>
> (b) Exercise separate responsibility for such interest; and
>
> (c) Be responsible for payment of the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

However, the definition of "producer" included in the appendix to the contract is as follows:

> Producer means a person who as owner, landlord, tenant, or sharecropper shares or would have shared had the crop been produced, in the risk of producing the crop (or share in the proceeds therefrom) as

> determined in accordance with 7 CFR § 713. The term "producer" as used in this appendix shall include both the "operator" and other producers of the crop on the farm. (Original emphasis)

It can immediately be seen that a "producer" as defined in the contract[3] is a much narrower term than "person." It is entirely possible that an individual could be a separate "person" under §795.3, but not a "producer" within the meaning of the contract if such individual did not share in the risk of production. In fact, the District Court in this case found that the individual farmers involved in the substantive counts were "separate persons" under the regulation and that the evidence was thus insufficient to convict these Petitioners of any of the substantive counts, *Appendix C.* Judge Eisele concluded that the farmers:

> ...were tenants, having a separate and distinct interest in the land or the crop involved; they exercise responsibility for such interest, albeit often through the means of "custom farming" (which the government admits is permitted); they clearly were responsible under their agreements for the cost of farming related to such interest; and each used a separate account from which to make such payments.

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[3]As will be argued in the following section of this Petition, the definition of "producer" found in the Code of Federal Regulations (7 C.F.R. § 719.2(t)) is significantly broader than the definition found in the appendix to the contract .

Appendix C17-18. The trial judge found that each of the farmers was a "separate person" and a "producer" as defined in the regulations, *Appendix C.*

It is apparent that the Government has expanded the scope of Petitioners' criminal liability by trying them for violating a contract provision which is found neither in the statute, the implementing regulations, or bill of particulars. As noted, the statute[4] limits to $50,000 the subsidy payments that may annually be made to each "person," and the regulations[5] specifically define "person" for these purposes. The trial judge found that each of the farmers involved in this case were separate "persons," and, therefor, entitled to a separate $50,000 annual payment.

Originally the Petitioners were indicted for causing the farmers to misrepresent their status as "producers." Then, in the Bill of Particulars, the Government changed its theory[6] and indicated that the Petitioners'

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[4] 7 U.S.C. §1301(1)(A)

[5] 7 C.F.R. §795.3 (1987)

[6] The six substantive counts of the information clearly charged the Petitioners with causing the tenant farmers to falsely represent themselves as "producers" on the contracts they signed with the CCC. However, in the Bill of Particulars, the Government informed Petitioners that they were charged with violating the separate "person" provisions of the statute and regulations. This is not the offense charged in the indictment. Judge Eisele correctly held that this was a fatal variance requiring vacation of the convictions. Under *Stirone v. United States,* 361 U.S. 212, 215-216 (1960) a new grand jury indictment was required before the prosecution could proceed under this entirely new theory.

crime was circumventing the separate "person" regulation. At trial the Government changed its theory back and contended that the farmers had misrepresented themselves as "producers." In support of this contention, the prosecution relied on the definition of "producer" found in an appendix to the applicable contracts. There are several problems with this procedure.

First, the definition of "producer" found in the contract, and relied upon by the Government, has never been properly promulgated as a regulation by the Department of Agriculture or any other governmental entity. In fact, *there is a* regulation defining "producer" found in the Code of Federal Regulations relating to the Department of Agriculture, dealing with these specific types of subsidy programs[7]. That regulation, found at 7 C.F.R. §719.2(t) defines "producer" as: "Person who, as owner, landlord, tenant, or sharecropper, is entitled to share in the crops available for marketing from the farm or in the proceeds thereof." Obviously, the regulation is substantially broader than the definition found in the contract appendix. Moreover, as found by the trial judge applying the regulatory definition of "producer," these Petitioners committed no crime because each of the

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7 The Court of Appeals held that 7 C.F.R. § 713.50(c) which defines "producer" in the same way as the contract appendix, *Appendix*. However § 713.50(c) is not applicable to this case. Inasmuch as the instant Program is administered by the Agricultural Stabilization and Conservation Service through State and county committees, the definitions found in part 719 of the regulations apply to this case, not the definitions in part 713 of the regulations, *see*, 7 C.F.R. § 719.1. For that reason the definition in § 719.2(t) applies, not the definition in § 713-50(c).

farmers was a "producer" as defined in this regulation.[8]

What the Government has done is expand the scope of the criminal statute by reference to a contract which includes provisions which are not found in the statute or the regulations. It is apparently the Government's position that the $50,000 restriction on payments requires not only that the recipient be a separate person as defined in the statute and regulation, but additionally that the recipient must be a "producer" or "operator" as defined in the contract appendix. But that is not the law. The Government may not base criminal liability on an administrative regulation which has not been properly adopted, *United States v. Goodner Brothers Aircraft*, — F.2d —, 1992 WL 117148 (8th Cir. 6/4/ 92).

It is the Governments position that Petitioners caused the farmers to falsely represent themselves as "producers" in the contracts they signed with the CCC.[9] However, such statements have nothing to do with

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[8]Petitioners also believe that they are "producers," even under the definition found in the appendix to the contracts.

[9]Although it is notable that nowhere in the contracts were the farmers asked to certify that they met the appendix definition of "producer." The Government's entire claim of fraud revolves around the farmers signing their names to a box marked "producer." That is the extent of any false statement attributed to the farmers.

circumventing the "separate person" requirement.[10] It might be that the farmers made false statements on the contracts, but this is not what was stated in the Bill of Particular.

This Court should grant the instant writ to consider the extent to which the Government may rely on regulatory definition which are not found in the statute or regulations and are actually inconsistent with those regulations properly promulgated by the administrative agency.

C. It was Fundamentally Unfair and Highly Prejudicial to Charge Petitioners with Violating the Provisions of the Contract when they were informed that they were charged with Failing to Meet the Separate "Person" Provision of the Applicable Regulation.

The primary purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense and minimize surprise at trial, *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986); *United States v. Chavez*, 845 F.2d 219, 220 (3rd Cir. 1985). If a defendant

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[10]The Court of Appeals essentially held that Petitioners were charged *both* as circumventing the separate "person" regulation and misrepresenting the farmers as "producers," Appendix . However, the indictment charged only one of these offenses, and the Bill of Particulars alleged a second (different) offense. Petitioners' position is that the Government can not have it both ways. Either they have to be tried as charged in the indictment or stated in the Bill of Particulars.

is prejudiced by the variance between the proof and the bill of particulars, he is entitled a reversal of his conviction, *United States v. Francisco*, 575 F.2d 815, 818 (10th Cir. 1978); United *States v. Birrell*, 447 F.2d 1168, 1171 (2nd Cir. 1971).

Here it can be readily seen that these Petitioners were severely prejudiced by being informed in the bill of particulars that they were being charged with violating the "separate persons" regulations, only to have the Government change its theory of the case at trial to allege that the farmers who signed the contracts were not "producers."

The Petitioners were on notice that the Government contended that the farmers were not separate "persons" under the statute and regulation. The Petitioners were not informed that they were alleged to have induced the farmers to falsely state they were "producers." Indeed, because the contract definition of "producer" is more restrictive than the term "person" in the statute and regulations, Petitioners were essentially tried on a charge which was quite different than that within the indictment. They were surprised and prejudiced by the shift in the Government's position.

This Court should grant certiorari to consider the propriety of the Government's action in this case.

CONCLUSION

This Court should grant certiorari in this case to consider whether the United States has the right to appeal from a judgment of acquittal entered after the trial court concludes that the jury verdict is not supported by sufficient evidence to convict.

In the event the Government was authorized to appeal in this case, Petitioners ask the Court to consider whether the Government may continuously change its theory of prosecution without either creating a fatal variance from the indictment or denying the defendants adequate notice of the charges. For these reasons, Wayne and Ralph Huntsman ask that a writ of certiorari to the United States Court of Appeals for the Eighth Circuit issue and that the Court reinstate the judgment of acquittal entered by the district court.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-2549

United States of America, Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern
Wayne Huntsman and Ralph Huntsman, Appellees.	*	District of Arkansas.

Submitted: December 9, 1991

Filed: March 26, 1992

Before LAY,* Chief Judge,
WOLLMAN and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

The district court dismissed with prejudice the indictment against Wayne Huntsman and Ralph Huntsman and granted their motion for judgment of acquittal notwithstanding the jury's verdict. The government appeals. We reverse and remand.

*The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

I.

This case involves the agricultural commodities price support and adjustment program administered by the Commodity Credit Corporation (CCC) through the Agricultural Stabilization and Conservation Service (ASCS). Under the program, if the average market price for wheat, feed grain, certain types of cotton, or rice falls below the target price set by Congress, the government makes up the difference by paying money — "deficiency payments" to participating farmers. Agricultural Act of 1949, ch. 792, Title IV, §§ 401 et seq. (codified as amended principally at 7 U.S.C.A. §§ 1421 et seq. (West 1988 & Supp. 1991)).

Participants in the program could also borrow money from the government, using their crops for collateral ("commodity loan"). If the farmer decides not to repay the loan, he may simply keep the money and let the government keep the collateral.

Applicable regulations provide that, to be eligible for payments under the program, one must be a "producer" on a farm that is in compliance with certain reporting and other requirements. 7 C.F.R. § 713.50 (1984 and 1985) (redesignated at 7 C.F.R. § 1413). To be a "producer", one must be "a person who shares in the risk of producing the . . . crop in the current year (or shares in the proceeds therefrom) . . . or would have shared in the crop if it had been produced ...." 7 C.F.R. § 713.50(c).

For the years 1982-85, each "person" could receive no more than $50,000 in annual deficiency payments. Agricultural Act of 1981, Pub. L. No. 97-98, 95 Stat. 1263 (codified as amended at 7 U.S.C.A. § 1308 (West 1988 & Supp. 1991). Regulations provide that an individual or

legal entity is a "person" entitled to receive deficiency payments only if he has a separate and distinct interest in the crop or the land on which the crop is produced; 23 exercises separate responsibility for that interest; and 3) is responsible for paying the cost of farming related to that interest from a fund or account separate from that of any other individual or entity. 7 C.F.R. § 795.3 (1984 and 1985).

Thus, a landlord and a tenant could each be eligible to receive up to $50,000 in deficiency payments. To qualify, each would have to fulfill two requirements. First, each would have to be a producer in order to participate in the program at all. Second, each would have to be a separate person. To take part in the program, both the landlord and the tenant would sign a "Contract to Participate in Price Support and Production Adjustment Programs" ("Contract") with the ASCS. The landlord would sign the Contract as the "operator," defined in the Contract's appendix as "the person who is in general control of the entire farming operation on the farm" during the relevant year. The tenant would sign the Contract as a "producer," defined in the Contract's appendix as "a person who, as owner, landlord, tenant, or sharecropper shares, or would have shared had the crop been produced, in the risk of producing the crop (or shares in the proceeds therefrom) . . . ."

During 1984 and 1985, several tenants entered written lease agreements with Huntsman Farms, Inc. ("Huntsman Farms") to rent rice or wheat land. Each tenant also signed a Contract with the ASCS to participate in the price support program, representing themselves as producers, with their landlord, Huntsman Farms, as the operator. The government brought a seven

count indictment against Wayne and Ralph Huntsman, charging that they had caused the tenants to misrepresent their status to the ASCS in order to qualify for the program. Count I of the indictment charged that, between 1984 and 1987, Wayne and Ralph Huntsman conspired with each other and with other persons to cause the tenants to falsely represent that the tenants were "producers," when in fact Huntsman Farms was the true producer. Count I further charged that, as part of the conspiracy, Wayne and Ralph Huntsman used the tenants to circumvent the "separate person" requirement, and that Wayne and Ralph Huntsman diverted the program payments from the tenants to themselves and to Huntsman Farms in circumvention of applicable regulations.

Counts II through VII each charged that Wayne and/or Ralph Huntsman caused a particular tenant to misrepresent his status as a "producer" in 1984 and/or 1985, when in fact Wayne and Ralph Huntsman knew that Huntsman Farms would be the true producer.[1]

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[1]Specifically, the government charged as follows: Count II charged that Wayne Huntsman caused Bill Long to misrepresent his status on or about March 15, 1984; Count III charged that both Wayne and Ralph Huntsman caused Roy Crowder to misrepresent his status on or about March 15, 1984; Count IV charged that Wayne and Ralph Huntsman caused Roy Crowder to misrepresent his status on or about June 12, 1985; Count V charged that Wayne Huntsman caused Bill Long to misrepresent his status on or about June 14, 1985; Count VI charged that Wayne caused Jimmie Mason to misrepresent his status on or about June 12, 1985; and Count VII charged that Ralph Huntsman caused L. E. Jack Parks to misrepresent his status on or about June 20, 1985. Each of the named dates corresponds to the date the respective tenants signed a Contract to Participate with the ASCS.

Counts II through VII did not incorporate by reference the allegations contained in Count I. Each of Counts II through VII did, however, specify that each tenant made the misrepresentation when he identified himself as a "producer" on the Contract he entered into with the ASCS.

At the court's direction, the government later amended the indictment by filing a bill of particulars. The bill of particulars described the program's requirement that each "person" receive no more than $50,000.00 under the program and recited that the false statements alleged in the indictment were made to circumvent the definition of the term "person."

The government's proof of the misrepresentations varied for each tenant. Essentially, the government sought to prove that even though each tenant signed a lease with Huntsman Farms that was valid on its face, each lease arrangement was in reality a sham. The government sought to show that each tenant signed up at the behest of Wayne and/or Ralph Huntsman, that each simply funneled to Wayne or Ralph Huntsman or to Huntsman Farms the money he received under the program, and that Wayne and/or Ralph Huntsman so manipulated the transactions with the tenants that the four tenants were not in actuality entitled to share in the proceeds from the crops produced on the leased land.

The first of the four tenants, Bill Long, had leased land from Huntsman Farms on which to grow soybeans prior to 1984. Those leases had been on a crop share basis, i.e., Long paid a portion of the crop as rent. Long stated that he controlled the planting, harvesting and sale of the beans grown on land subject to his lease.

Long signed a Contract with the ASCS to participate in the price support program for the years 1984 and 1985. He represented to the ASCS that he would lease 500 acres of rice land from Huntsman Farms during 1984 and 350 acres in 1985, for $150 per acre. Long testified that he did not intend to grow rice either year, and in fact did not, although he knew that someone grew rice on the land subject to his lease during 1984 and 1985. Long testified that he signed up for the rice program because "Wayne asked me if I would participate in the program . . . [b]ecause of the government limitations they had on the payment."

Long stated that he received none of the proceeds from the sale of the rice crop produced on the land to which his lease applied, and incurred none of the expenses. Long testified that he did, however, receive a $27,996.91 check for deficiency payments under the program in 1984. Long stated that he gave the check to Wayne Huntsman according to an agreement between the two. Long was entitled to receive an additional $22,003.09 in deficiency payments in 1984, but that money was withheld to pay money that he owed to the government. In 1985, Long received several checks under the program. One of the checks he kept as a loan from Wayne Huntsman, but he directed that the remainder of the checks be deposited in his wife's account and their proceeds paid to Wayne Huntsman.

The second tenant, Roy Crowder, had worked for Ralph Huntsman as an employee and had sharecropped rice and bean land under oral agreements with members of the Huntsman family prior to 1984. The only leases which were written, he stated, were those he entered in conjunction with the price support program. When

Crowder had grown beans on land leased from the Huntsmans, Crowder handled the transport and sale himself.

Crowder signed leases with Huntsman Farms for 500 acres in 1984 and 350 acres in 1985, at $150 per acre. Crowder testified that he thought that price to be very high, and that one could not make any money farming rice on such terms. In his opinion, $75 per acre would be a fair price. Crowder did not control the storage and sale of the rice grown on the land subject to the written lease with Huntsman Farms. As far as Crowder knew, Wayne Huntsman made the decisions regarding sale of the rice.

Crowder testified that he signed up for the program at Wayne's behest. He did not realize that he would qualify for money from the government; he thought that his signing up was necessary to prevent the government from reducing the Huntsman's allotment of land for rice farming.

The record reveals several instances where Crowder received money from the program, then either gave it to one of the Huntsmans directly or deposited it in his own account before writing checks to the Huntsmans. In 1984, for example, Wayne Huntsman told Crowder that they needed to go to the ASCS office to pick up a check. After the pair retrieved the check (a commodity loan check for more than $112,000.00), Wayne Huntsman offered to deposit it for Crowder. The check was never deposited in Crowder's account. In 1985, Crowder received a $50,000.00 rice deficiency check from the program and deposited it in his account. The day after Crowder deposited the check, one check for $23,500.00 and one for $22,500.00 were drawn on the account.

payable to Huntsman Farms, for rent and combining expenses. Crowder testified that Ralph Huntsman made out the checks and Crowder directed his wife to sign them. Crowder stated that combining expenses for the 350 acres of rice land he rented from Huntsman Farms should have been no more than $10,000.00 to $15,000.00. Crowder also maintained that his usual wages were withheld after he received the $50,000.00 rice deficiency check. In effect he kept in lieu of wages the $4,000.00 difference between the $50,000.00 deficiency payment and the $46,000.00 paid to Huntsman Farms.

The third tenant, Jimmie Mason, had rented soybean land from the Huntsmans under an oral crop share agreement prior to 1984. Mason had never farmed rice, but when Wayne Huntsman asked if Mason would lease rice land from the Huntsmans and participate in the program, Mason agreed. Mason signed a lease agreement with Huntsman Farms to rent 350 acres of rice land at $150 per acre. Mason later changed his mind and told Wayne Huntsman that he would not farm rice, and therefore would not participate in the program. Nonetheless he signed the Contract with the ASCS to participate in the program, with the understanding that Wayne Huntsman would use Mason's name to keep the 350 acres of rice land in the program. Although Mason helped harvest rice in 1985, as he had previously, he was paid for this service. He stated that he did not own the rice produced on the land to which his lease agreement applied.

Mason received a check from the program in early 1985 and deposited it in his own account. The next day he signed a check drawn on the account; Wayne Huntsman filled in the check for the same amount that

Mason had deposited the day before, noting on the check's memo line that the check was for "rice rent." Mason stated that he did not consider the government checks to be his since he had decided not to participate in the program. Mason also received a commodity loan payment of $62,090.80 from the program in 1985. The day after he deposited that sum in his account, two checks were drawn on Mason's account: one for $43,650.00 to Huntsman Farms for "rent," and another for $18,440.80 to Huntsman Granary for "storage and drying." Wayne Huntsman filled out the checks; Mason simply signed them.

The fourth tenant, Jack Parks, was a school principal acquainted with Ralph Huntsman. He had never farmed. He stated that late in 1984, Ralph Huntsman suggested that Parks rent wheat land from Huntsman Farms and that Ralph would manage the farming for him. Parks signed a lease agreement with Huntsman Farms to rent 1780 acres of wheat land on a crop share basis. He may also have been involved in farming soybeans, but could not recall. Ralph Huntsman loaned Parks $8,000.00 to start the venture and instructed Parks to open a separate farm account with the loan. Parks stated that he did not control what was grown on the land, nor when any crops would be sold.

In 1985, Parks signed a Contract to participate in the program. He stated that he did not know what the program was, but he recalled Ralph Huntsman telling him that it was necessary in order to continue farming. In any event, he signed up because Ralph Huntsman asked him to do so.

Early in 1985, Parks received a check from the

program for $25,047.09, which he deposited in his farm account. Two months later, he wrote a $24,000.00 check to Huntsman Farms. Parks recalled that Ralph Huntsman instructed him to write the check to cover the rent on the land. The record does not explain why cash rent was due under Parks' crop share lease with Huntsman Farms; it may have been due under any soybean venture in which Parks was involved.

Parks received other checks from the program during 1985 and deposited them in his farm account. He then wrote checks at Ralph Huntsman's direction. Parks recalled the purpose of some of these checks, such as the repayment of the $8,000.00 loan Ralph Huntsman had extended him. Parks did not recall the purpose of other checks that he wrote, for example an $11,500.00 check for seed beans payable to an acquaintance of Ralph Huntsman, or an $8,930.00 check payable to Ralph Huntsman, of which $6,930.00 was designated as "interest payment" and $2,000.00 as "principal."

At Ralph Huntsman's direction, Parks wrote two checks in late 1985 to his son and daughter. Each was for $3,000.00, and each was designated for "farm labor '85." Parks' son had worked for Ralph Huntsman as a farm laborer and had been paid for that work, but Parks' daughter had never worked on the farm. Both the son and the daughter subsequently wrote checks for $3,000.00 to Ralph Huntsman, although they did not recall owing Ralph any money.

To the best of his recollection, Parks neither gained nor lost any money through his wheat farming venture with Ralph Huntsman. There was evidence, however, that Parks' tax return showed a purchase of nearly

$60,000.00 in farm equipment from Ralph Huntsman, with a depreciation deduction of approximately $13,000.00 in 1985. Parks stated that Ralph Huntsman had not tried to collect from him any money due on the purchase of farm equipment. As of January 1990, Parks did not know where the equipment was located.

In closing arguments, the government contended that the four tenants did not exercise separate responsibility for the land they leased. First, they did not control the farming operation on the leased land. Second, each lease arrangement was simply a false front. In fact, the government argued, none of the four tenants shared or were intended to share in the proceeds from the crops.

The jury instructions concerning Counts II through VII identified the relevant false statements as the tenants' representations of themselves as producers. The instructions contained no definition of producers; apparently, none was requested.

The jury acquitted both Wayne and Ralph Huntsman on Count I, the conspiracy charge, but convicted them on Counts II through VII. The defendants moved to dismiss the charges on the ground that there was a fatal variance between the acts charged in Counts II through VII and the proof at trial. The defendants also moved for judgment of acquittal notwithstanding the verdict, on the ground that the evidence was insufficient to sustain the verdict. The district court granted the motions, and the government appeals.[2]

II.

It is reversible error per se to amend an indictment after a grand jury has passed upon it. *United States v. Begnaud*, 783 F.2d 144, 147 & n.4 (8th Cir. 1986). An amendment occurs "when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them." Id. at 147 n.4. Similarly, the acts proved at trial may not vary from those charged in the indictment. Id. A variance "occurs when the essential elements of the offense set forth in the indictment are left unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment." Id. Reversal is not required if the variance is harmless, that is, if "the indictment fully and fairly apprised the defendant of the charges he or she must meet at trial." Id. at 148.

The district court reasoned that while the indictment charged that the tenants had misrepresented their status as producers, the proof at trial focused on whether the four tenants qualified as separate persons. Since Counts II through VII did not allege anything regarding whether the misrepresentations involved the tenants' status as separate persons, the district court concluded that the

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[2]Wayne and Ralph Huntsman dispute the right of the government to appeal from the dismissal of an indictment because of an amendment or fatal variance. We reject this argument. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). We also reject their argument that the government has failed to prosecute the appeal in a timely manner.

government either constructively amended the indictment or that there was a fatal variance between the indictment and the proof presented at trial.[3]

Our review of the record leads us to a different conclusion. The indictment specified which tenants made alleged false statements, the date the statements were made, and to whom they were made. It detailed who caused each false statement to be made: Wayne Huntsman, Ralph Huntsman, or both. It specified that the statements were false because they represented that the tenants would be producers, when in fact Huntsman Farms was the true producer. The bill of particulars refined the indictment still further, explaining that Wayne and Ralph Huntsman caused the false statements to be made in order to circumvent the $50,000 per person limitation on payments under the program.

Reasonably construed, therefore, the indictment and bill of particulars indicated that the government would try to prove that Wayne and Ralph Huntsman caused the tenants to apply for the program in order to circumvent the per person payment limitation of $50,000.00. Further, the indictment indicated that the government would try to prove that Wayne and/or Ralph Huntsman

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[3]The district court's opinion does not make clear whether it found a constructive amendment, a fatal variance, or both. In its opinion, the district court stated its conclusion that "the government is attempting constructively to amend the indictment by altering an element of the offense." *United States v. Wayne Huntsman and Ralph Huntsman*, No. LR-CR-88-151(1) and (2), slip op. at 12 (E.D. Ark. June 10, 1991). The district court went on, however, to address whether the "variance" was "harmless." Id. at 13.

pursued this scheme by causing Long, Crowder, Mason and Parks to misrepresent their status when each signed the ASCS Contract to Participate. According to the indictment, the false statements concerned the four tenants' status as producers, defined in the Contract as "a person who, as . . . tenant, shares, or would have shared had the crop been produced, in the risk of producing the crop (or shares in the proceeds therefrom) . . . ."

We fail to see how the indictment was amended. Contrary to the district court's conclusion, the defendants were not convicted because they caused false statements to be made concerning the tenants' status as "separate persons." The government's proof concerning the separate person requirement was necessary to show Wayne and Ralph Huntsman's motivation for pursuing the scheme. Had there been no $50,000.00 per person limitation on payments, it would not have been necessary for them to recruit the tenants to apply for the program. Also, proving that the tenants were not separate persons shows how the defendants intended to obtain something of value from the CCC. *See Jacobs v. United States, infra*. Finally, proof that one is not a producer may overlap somewhat with proof that one is not a separate person. A producer is one who shares in the risks of producing a crop or shares in the proceeds therefrom, while one element of being a separate person is having a separate and distinct interest in the crop.

The indictment alleged the false statements to be the tenants' representations of themselves as producers. The proof tended to show that they were not producers. The jury instructions on Counts II through VII conformed to these charges, noting that the statements at issue

were Long's, Crowder's, Mason's, and Parks' representations that they would be producers. Since the material elements addressed in the proof and in the jury instructions matched those charged in the indictment, the indictment was not amended.

Similarly, we perceive no fatal variance. As described above, the indictment put Wayne and Ralph Huntsman on notice that the prosecution would try to prove that the four tenants misrepresented their status as producers when each signed the Contract to Participate. The evidence offered by the government conformed to these charges. It tended to show that Long, Crowder, Mason and Parks represented themselves as producers when each signed the Contract. The evidence also tended to show that the statements were false because none of the four qualified as producers entitled to share in the crops, either because they would not farm the leased land or have it custom farmed for them,[4] or because they would not share in the risks and benefits of farming the land because Wayne and Ralph Huntsman would manipulate the transactions. We therefore conclude that the facts proved at trial did not materially vary from those alleged in the indictment.

III.

When reviewing the grant of a motion for judgment of acquittal, we view the evidence in the light most favorable

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[4]One need not physically perform farm labor to participate in the program. One could hire another to farm the land so long as the compensation for the work was not dependent on the amount of the crop produced. *See* 7 C.F.R. § 795.16 (1984 and 1985).

to the prosecution, *United States v. Mundt*, 846 F.2d 1157, 1158 (8th Cir. 1988), and give the prosecution "the benefit of all inferences that may reasonably be drawn in its favor." *United States v. Rodriquez*, 812 F.2d 414, 416 (8th Cir. 1987). "[A] motion for a judgment of acquittal should be denied when . . . there is substantial evidence justifying an inference of guilt as found irrespective of any countervailing testimony that may be introduced." Id. at 416. The opinion should be granted "only where the evidence is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged." *Mundt*, 846 F.2d at 1158. The evidence need not, however, exclude every reasonable hypothesis besides guilt. Id. The e essential elements for a conviction under 15 U.S.C. section 714m(a) are 1) a statement; 2) that is false; 3) the defendant knows it to be false; and 4) the defendant makes it for the purpose of either influencing action of the CCC or obtaining something of value under an act applicable to the CCC. *Jacobs v. United States*, 359 F.2d 960, 963 (8th Cir. 1966).

The district court found the evidence insufficient because, under the lease agreements, the tenants were contractually bound to share the risks and entitled to share the proceeds from farming operations on the leased land. Since Long, Crowder, Mason and Parks necessarily qualified as producers because of the lease contracts, the district court concluded that there was insufficient evidence to prove that Wayne and Ralph Huntsman had caused any false statements to be made. The district court also found the evidence insufficient to prove that Wayne and Ralph Huntsman had any criminal intent when they urged the tenants to enter into the lease agreements.

On the face of the lease agreements, Long, Crowder, Mason and Parks were entitled to keep whatever they produced on the leased land. Their only obligation was to pay cash rent or, in Parks' case, a share of the crop and expenses. If the lease agreements were a false front, however, such that the four tenants were not entitled to share in the proceeds, they would not qualify as producers. *See United States v. Thomas*, 593 F.2d 615, 619-20 (5th Cir. 1979) (evidence of sham nature of transactions sufficient to show individuals not entitled to receive government benefits, and thus statements to the contrary were false, even though paper structure indicated that the individuals were entitled), *cert. denied*, 449 U.S. 841 (1980). Similarly, the tenants would not qualify as producers if they never intended to farm at all, or have the land custom farmed for them.

We deem it unnecessary to recount the facts set forth above. The evidence is clear that Long and Mason never intended to farm the land subject to their "leases." Neither intended to share, and neither in fact shared, in the crop produced. As to Crowder and Parks, the record reveals a consistent pattern by which, at the direction of Wayne and Ralph Huntsman, the proceeds from the crops were funneled to Wayne Huntsman, Ralph Huntsman, or Huntsman Farms. When viewed in the light most favorable to the prosecution, the evidence supports the inference that the four tenants were not producers, because they never shared or were intended to share in the crop proceeds. The evidence thus supports the conclusion that the four tenants made false statements when they represented themselves as producers on the Contracts to Participate.

Likewise, the evidence also supports the jury's finding that Wayne and/or Ralph induced each tenant to sign the Contract to Participate as charged in Counts II through VII. Again, we deem it unnecessary to recount the evidence described above. Suffice it to say that none of the tenants would have signed the Contract to Participate had he not been asked to do so by the Huntsmans.

The judgment dismissing the indictment is reversed. The judgment of acquittal on Counts II through VII is likewise reversed, and the case is remanded to the district court with directions to reinstate the jury's verdict on those counts.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91—2549EALR

United States of America, Appellant,	*	
	*	Order Denying Petition
vs .	*	for Rehearing and
	*	Suggestions for
Wayne Huntsman;	*	Rehearing En Banc
Ralph Huntsman, Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

May 1, 1992

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

V. No. LR-CR-88-151 (1) and (2)

WAYNE HUNTSMAN and RALPH HUNTSMAN

JUDGMENT OF ACQUITTAL AND ORDER OF DISMISSAL

In accordance with the Court's Order of this date, the Court will dismiss the indictment against the defendants. IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the conspiracy count, Count I of the indictment, be, and it is hereby, DISMISSED as to both defendants in accordance with the jury's verdict of not guilty. IT IS FURTHER CONSIDERED, ORDERED, AND ADJUDGED that the remaining counts of the indictment, Counts II through VII, be, and they are hereby, DISMISSED as to both defendants notwithstanding the jury verdict.

Dated this 10th day of June, 1991.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

V. NO. LR-CR-88-151 (1) and (2)

WAYNE HUNTSMAN AND
RALPH HUNTSMAN

ORDER

Defendants' combined and joint motions for judgment of acquittal or judgment notwithstanding the verdict and motion to dismiss the indictment and motion for arrest of judgment are before the Court.

This is a criminal prosecution in which the defendants are charged with a conspiracy in violation of Title 15 U.S.C. section 714m(d) and also with six substantive counts charging one or both of them with causing false statements to be made to the United States in violation of Title 15 U.S.C. section 714m(a).

A jury on May 16, 1990 found the defendants guilty of the substantive counts in the indictment but acquitted both defendants of the conspiracy count. The Court held a hearing on January 25, 1991 to allow counsel on the record and in open court to argue the motions to overturn the jury verdicts. The record of the January 25 hearing is incorporated herein by reference. For the reasons discussed at the hearing and for the reasons discussed below, the Court will grant defendants' motion for dismissal of the substantive counts of the indictment

and the defendants motions for judgment of acquittal and judgment notwithstanding the verdicts on those counts. The Court also will enter a judgment of acquittal on the jury's verdict on the conspiracy count.

The first issue that the Court must resolve is whether the substantive counts of the indictment, standing alone, allege that the defendants committed the crimes for which they have been found guilty. Each substantive count alleged that one or both of the defendants willfully and knowingly caused a separate false statement to be made to the Commodity Credit Corporation for the purpose of obtaining money for himself or themselves in violation of 15 U.S.C. sec. 714. In particular, the substantive counts of the indictment alleged that various individuals signed contracts to participate as "producers" in government price support programs for rice in 1984 and 1985 when the individuals signing the contracts were not "producers" at all but, rather, that Huntsman Farms, Inc. was the "producer" and "operator" of the farms.

I. FACTUAL BACKGROUND

This brief review of the facts summarizes part of the proof at the trial. Defendants Wayne and Ralph Huntsman at one time were principals in a venture known as Huntsman Farms, Inc., located in Bald Knob, Arkansas. They disassociated themselves from the corporation and were no longer principals of Huntsman Farms, Inc. at the time of the acts for which the jury found them guilty. The defendants apparently did continue to exercise some responsibility for the corporation's farm supply store and the corporation's granary, however.

Huntsman Farms, Inc., was a corporation whose assets included the Huntsman Farm, a large farm of some 14 to 15 thousand acres, a supply store, and a granary. The principals in the corporation were Harold V. Huntsman and Maudie Huntsman, parents of defendants Wayne and Ralph Huntsman.

II. ALLEGATIONS IN THE INDICTMENT

Count I of the indictment alleged that several plots of land belonging to Huntsman Farm, Inc. were leased to various individuals for the purpose of evading certain legal limitations on federal crop support payments to Huntsman Farms, Inc. The six substantive counts of the indictment, as set out more fully below, allege that Ralph and Wayne Huntsman willfully and knowingly caused unindicted persons to make false statements to the Commodity Credit Corporation in violation of 15 U.S.C. sec. 714 and 18 U.S.C. sec. 2. The substantive counts of the indictment did not incorporate the allegations in the conspiracy count.

The Court sets out the indictment in full because the charges set forth in the counts of the indictment are critically important. The conspiracy count, Count I, alleged:

> 1. That from on or about February 17, 1984, to on or about March 26, 1987, in the Eastern District of Arkansas, WAYNE HUNTSMAN and RALPH HUNTSMAN did knowingly combine, conspire, confederate, and agree with each other and with co-conspirators, named herein and unnamed, to make and cause to be made false statements for the purpose of influencing the action of the Commodity Credit

Corporation ("CCC") and for the purpose of obtaining money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949.

2. It was part of said conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would deceive the Commodity Credit Corporation through the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service ("ASCS") by means of false, fraudulent, and misleading statements and representations concerning the identities of interest in applications for and payment of benefits payable under the ASCS Price Support and Production Adjustment Program in order for the applicant to receive money, funds and credits which would be diverted to Huntsman Farms, Inc., WAYNE HUNTSMAN and RALPH HUNTSMAN.

3. It was a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would enlist the assistance of co-conspirators to provide their individual names to ASCS as "producers" (tenants) of farming operations when, in fact, Huntsman Farms, Inc. was the true producer and operator and was ineligible for additional payments through CCC on account of Huntsman Farms, Inc., having reached its payment limitation.

4. It was a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would use said co-conspirators to circumvent payment limitations under applicable CCC regulations and the "separate person" requirement for entitlement to benefits.

5. It was further a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would divert from their co-conspirators to themselves and Huntsman Farms, Inc. the payments received from CCC in circumvention of its regulations.

6. In furtherance of the conspiracy and to effect the object thereof, the following overt acts were committed within the Eastern District of Arkansas:

On or about the following dates the following persons signed Form ASCS-477, Contract to Participate in Price Support and Production Adjustment Programs as "Operators":

1.	Bill Long	3-15-84
2.	Roy Crowder	3-15-84
3.	Roy Crowder	6-12-85
4.	Jimmie Mason	6-12-85
5.	Bill Long	6-14-85
6.	L.E. Jack Parks	6-20-85

All in violation of Section 714m(d), Title 15, United States Code.

Count I of the indictment, docket no. 1 (both files).

The substantive counts of the indictment read as follows:

COUNT II: That on or about March 15, 1984, in the Eastern District of Arkansas, WAYNE HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the

Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1984 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN did cause Bill Long to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Bill Long stated and represented that for the crop year 1984 Bill Long would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

COUNT III: That on or about March 15, 1984, in the Eastern District of Arkansas, WAYNE HUNTSMAN and RALPH HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself [sic] money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1984 Rice Diversion and Defiaiency Program payments, WAYNE HUNTSMAN and RALPH HUNTSMAN did cause Roy Crowder to submit to the White County, Arkansas, office of the

Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Roy Crowder stated and represented that for the crop year 1984 Roy Crowder would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN and RALPH HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and section 2, Title 18, United States Code.

COUNT IV: That on or about June 12, 1985, in the Eastern District of Arkansas, WAYNE HUNTSMAN and RALPH HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself [sic] money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural ACt of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN and RALPH HUNTSMAN did cause Roy Crowder to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Roy Crowder stated and represented that for the crop year 1985 Roy Crowder would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact,

as WAYNE HUNTSMAN and RALPH HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and section 2, Title 18, United States Code.

COUNT V: That on or about June 14, 1985, in the Eastern District of Arkansas, WAYNE HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN did cause Bill Long to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Bill Long stated and represented that for the crop year 1985 Bill Long would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

COUNT VI: That on or about June 12, 1985, in the Eastern District of Arkansas, WAYNE

HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN did cause Jimmie Mason to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Jimmie Mason stated and represented that for the crop year 1985 Jimmie Mason would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

COUNT VII: That on or about June 20, 1985, in the Eastern District of Arkansas, RALPH HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, RALPH

> HUNTSMAN did cause L.E. Jack Parks to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which L.E. Jack Parks stated and represented that for the crop year 1985 L.E. Jack Parks would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as RALPH HUNTSMAN then well knew Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

Docket no. 1 (both files).

III. LEGAL SUFFICIENCY OF AN INDICTMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . .

U.S. Const. amend. V, sec. 1.

A court cannot permit a defendant to be tried on charges that are not made in the indictment against him. *United States v. Begnaud*, 783 F.2d 144, 147 (8th Cir. 1986) *citing Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273 (1960) and *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984); *see also Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038 (1962); *Ex Parte*

Bain, 121 U.S. 1 (1887). "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone*, 361 U.S. at 218. As the Supreme Court stated in an earlier case:

> The institution of the grand jury was adopted in this country, . . . and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body . . . shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

Ex parte Bain, 121 U.S. at 11 (*cited* in *Stirone*, 361 U.S. at 218 n.3).

IV. APPLICATION OF THE LAW TO SUBSTANTIVE COUNTS

The issue in this case is whether the substantive counts of the indictment sufficiently apprised the Huntsmans of what they had to be prepared to meet at trial. The Court concludes that the substantive counts of the indictment, standing alone, did not sufficiently apprise Wayne and Ralph Huntsman of the case the

government attempted to present against them at trial. In short, there is a fatal variance between the proof and the charges set forth in Counts II through VIT.

The substantive counts of the indictment did not incorporate the allegations in the conspiracy count. Two paragraphs contained in the conspiracy count are important:

> 4. It was a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would use said co-conspirators to circumvent payment limitations under applicable CCC regulations and the "separate person" requirement for entitlement to benefits.
>
> 5. It was further a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would divert from their co-conspirators to themselves and Huntsman Farms, Inc. the payments received from CCC in circumvention of its regulations.

Rather, the substantive counts relied exclusively on the allegations that Bill Long, Roy Crowder, Jimmie Mason, and Jack Parks represented themselves to be, and signed their contracts as, "producers," whereas Huntsman Farms, Inc. was in fact the true producer and operator.

The jury acquitted Wayne and Ralph Huntsman of the conspiracy charged in Count I. The substantive counts of the indictment do not incorporate paragraphs 4 and 5 from the conspiracy count. Thus the Court may not rely on those paragraphs to "apprise the defendants" of what they must be prepared to meet.

In the bill of particulars, in the proof at trial, and in the instructions submitted to the jury, there was no mention of the definition of the term "producer."[1] The focus at trial was upon the definition of "separate person."[2] This coincided with the prosecution of the conspiracy count, which specifically alleged that the Huntsmans tried to circumvent the payment limitation and the definition of "separate person." When the jury acquitted the Huntsmans of the conspiracy charge, however, the jury effectively exposed the inadequacy of the substantive counts of the indictment.

The government seeks to uphold the jury verdicts on

---

[1]A "producer" is a person who, as owner, landlord, tenant or sharecropper, is entitled to share in the crops available for marketing from the farm or in the proceeds thereof. 7 C.F.R. sec. 719.2(t) (1984 and 1985).

[2]The definition of a "separate person" is contained in the Code of Federal Regulations:

> Subject to the provisions of this part, the term "person" shall mean an individual, joint stock company, corporation, association, trust, estate, or other legal entity. In order to be considered a separate person for the purpose of the payment limitation, in addition to the other conditions of this part, the individual or other legal entity must:
>
> (a) Have a separate and distinct interest in the land or the crop involved,
>
> and
>
> (b) Exercise separate responsibility for such interest,
>
> (c) Be responsible for the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

7 C.F.R. sec. 795.3 (1984 and 1985).

the substantive counts of the indictment on the theory that the proof at trial supports the allegations that Long, Crowder, Mason, and Parks were not "separate persons." That argument misses the point. The government seeks constructively to amend the substantive counts of the indictment to include the two allegations set forth in paragraphs 4 and 5 of the conspiracy count. The government failed to incorporate those paragraphs into the substantive counts, although they could have done so. *See* Fed. R. Crim. P. 7(C)(1). To allow the government so to amend the substantive counts of the indictment after the grand jury has been dismissed would be reversible error *per se*. *Begnaud*, 783 F.2d at 147.

"A variance occurs when the essential elements of the offense set forth in the indictment are left unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Begnaud* 783 F.2d at 147 n.4. In contrast " an amendment of the indictment occurs when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them." Id.

The Court concludes that the government is attempting constructively to amend the indictment by altering an element of the offense. The grand jury did not charge in the substantive counts that Wayne and Ralph Huntsman deceived the Commodity Credit Corporation by claiming to be "separate persons." The grand jury charged that the Huntsmans deceived the Commodity Credit Corporation by causing Long, Crowder, Mason, and Parks to make false statements that they were "producers" when Huntsman Farms, Inc.

was the true producer. Even assuming that the jury had been properly instructed on the definition of "producers" (which it was not), the proof offered at trial did not show that Long, Crowder, Mason, and Parks were not "producers" within the definition set forth in the regulations. None of the evidence shows that the leases those men signed with Huntsman Farms were not valid leases of the farmland. The Court refers specifically to the argument of record conducted on January 25, 1991 and particularly the portion in which this issue is discussed by the Court with Mr. Neighbors, Assistant United States Attorney.

Moreover, the variance would not be harmless. The substantive counts of the indictment did not mention the "separate person" violation. It would be unfair and actually prejudicial to hold the defendants accountable for evading the "separate person" requirement in the substantive counts of the indictment after the jury acquitted them of an explicit allegation of conspiring to evade the "separate person" requirement.

The Court concludes that the jury returned its verdicts of guilty based upon allegations not charged by grand jury before trial. Therefore the substantive counts of the indictments must be dismissed.

V. INSUFFICIENCY OF THE EVIDENCE

The Court concludes that it also must grant the defendants' motions for judgment of acquittal. There is no adequate evidentiary basis from which a jury could find that false statements were made by these people when they signed as "producers." It follows, therefore, that the defendants did not cause any false statements

to be made. The Court also concludes that no adequate evidentiary basis exists for finding that the defendants had any criminal intent when they urged these people to enter into the lease agreements.

This is not a case where the government put on proof that the written agreements between the individual farmers named in Count II through Count VII and Huntsman Farms, Inc. were a sham and a subterfuge not intended to represent the true legal relationships of the parties to such agreements. As a consequence of those agreements, the individuals were tenants of certain acreage and obligated to pay a cash rent, the amount of which had been approved by the County Committee. These parties were entitled to share in the crops or the proceeds. If this were a civil action brought by Huntsman Farms, Inc. and the testimony had been the same, Huntsman Farms would have been entitled to a directed verdict on rent liability. The rent charged was on the high side so it was unlikely that the individuals would receive much in profit. But assuming a rise in prices, Huntsman Farms, Inc., on the basis of the evidence presented, would be bound to the terms of the agreement even if large profits were thereby realized by the "producers." So they would share in the risks of losses or profits.

Even if the defendants had been charged with causing these individual farmers falsely to represent themselves as "separate persons" under 7 C.F.R. section 795.3, *see* footnote 2, the Court does not see the evidentiary basis upon which the jury could have found such representations to have been false when made. Clearly they were tenants, having a separate and distinct interest in the land or the crop involved; they exercised

responsibility for such interest, albeit often through the means of "custom farming" (which the government admits is permitted): they clearly were responsible under their agreements for the cost of farming related to such interest; and each used a separate account from which to make such payments.

It is the opinion of the Court that the jurors were misled by arguments of the government leading them to believe that only "hands on" farming would meet the test. Also the aura of conspiracy hung over the case even though the jury acquitted the defendants on Count I.

But, again, whether the jury might on this evidence have found the defendants caused the farmers falsely to represent that they were "separate persons," that is not what the defendants were charged with in Counts II through VII.

VI. CONCLUSIONS

The Court need not address the other arguments of the defendants. The defendants are entitled to judgments of acquittal on the substantive counts notwithstanding the verdicts. And defendants' motions to dismiss the substantive counts of the indictment also must be granted because of the fatal variance between the proof and the charges contained in those counts. The defendants may not be tried on charges that were not contained in the indictment. Finally, the Court will enter judgment of acquittal on the conspiracy count, in accordance with the verdict of the jury.

IT IS THEREFORE ORDERED that defendants' motion for arrest of judgment be, and it is hereby,

GRANTED (docket no. 67 in No. LR-CR-88-151(1)(Wayne Huntsman) and docket no. 74 in No. LR-CR88-151(2) (Ralph Huntsman)).

IT IS FURTHER ORDERED that the substantive counts of the indictment, Counts II through VII, be, and they are hereby, DISMISSED.

IT IS FURTHER ORDERED that defendants' motion for judgmentof acquittal be, and it is hereby, GRANTED (docket no. 67 and docket no. 74 as above).

IT IS FURTHER ORDERED that defendants' motion for a mistrial, made at trial and renewed at the hearing on January 25, 1991, be, and it is hereby, DENIED for the reasons stated on the record.

IT IS FURTHER ORDERED that defendants' motion for a new trial, made at the hearing on January 25, 1991, be, and it is hereby, DENIED as untimely. Federal Rule of Criminal Procedure 33 states that such motions must be made within 7 days after a jury renders a verdict of guilty.

Dated this 10th day of June, 1991.

/s/
UNITED STATES DISTRICT JUDGE

IN THE STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES	)	No. LR-CR-88-
OF AMERICA	)	
	)	15 U.S.C. §714m(d)
V.	)	15 U.S.C. §714m(a)
	)	18 U.S.C. §2
WAYNE HUNTSMAN	)	18 U.S.C. §3623
RALPH HUNTSMAN	)	18 U.S.C. §3013

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. That from on or about February 17, 1984, to on or about March 26, 1987, in the Eastern District of Arkansas, WAYNE HUNTSMAN and RALPH HUNTSMAN did knowingly combine, conspire, confederate and agree with each other and with co-conspirators, named herein and unnamed, to make and cause to be made false statements for the purpose of influencing the action of the Commodity Credit Corporation ("CCC") and for the purpose of obtaining money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949. 2. It was part of said conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would deceive the Commodity Credit Corporation through the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service ("ASCS") by means of false, fraudulent, and misleading statements and representations concerning the identities of interest in applications for and payment

of benefits payable under the ASCS Price Support and Production Adjustment Program in order for the applicant to receive money, funds and credits which would be diverted to Huntsman Farms, Inc., WAYNE HUNTSMAN and RALPH HUNTSMAN.

3. It was a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would enlist the assistance of co-conspirators to provide their individual names to ASCS as "producers" (tenants) of farming operations when, in fact, Huntsman Farms, Inc. was the true producer and operator and was ineligible for additional payments through CCC on account of Huntsman Farms, Inc., having reached its payment limitation.

4. It was a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would use said co-conspirators to circumvent payment limitations under applicable CCC regulations and the "separate person" requirement for entitlement to benefits.

5. It was further a part of the conspiracy that WAYNE HUNTSMAN and RALPH HUNTSMAN would divert from their co-conspirators to themselves and Huntsman Farms, Inc. the payments received from CCC in circumvention of its regulations.

6. In furtherance of the conspiracy and to effect the object thereof, the following overt acts were committed within the Eastern District of Arkansas:

On or about the following dates the following persons signed Form ACSC-477, Contract to Participate in Price Support and Production Adjustment Programs as

"operators":

1.	Bill Long	3-15-84
2.	Roy Crowder	3-15-84
2.	Roy Crowder	6-12-85
4.	Jimmy Mason	6-12-85
5.	Bill Long	6-14-85
6.	L.E. Jack Parks	6-20-85

All in violation of Section 714m(d), Title 15, United States Code.

COUNT II

That on or about March 15, 1984, in the Eastern District of Arkansas, WAYNE HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1984 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN did cause Bill Long to submit to the White County, Arlsansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Bill Long stated and represented that for the crop year 1984 Bill Long would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United

States Code.

COUNT III

That on or about March 15, 1984, in the Eastern District of Arkansas, WAYNE HUNTSMAN and RALPH HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1984 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN and RALPH HUNTSMAN did cause Roy Crowder to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Roy Crowder stated and represented that for the crop year 1984 Roy Crowder would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN and RALPH HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

COUNT IV

That on or about June 12, 1985, in the Eastern District of Arkansas, WAYNE HUNTSMAN and RALPH HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity

Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN and RALPH HUNTSMAN did cause Roy Crowder to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Roy Crowder stated and represented that for the crop year 1985 Roy Crowder would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN and RALPH HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section, 14m(a), Title 18, United States Code, and Section 2, Title 18, United States Code.

COUNT V

That on or about June 14, 1985, in the Eastern District of Arkansas, WAYNE HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN did cause Bill Long to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Bill Long stated and

represented that for the crop year 1985 Bill Long would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

COUNT VI

That on or about June 12, 1985, in the Eastern District of Arkansas, WAYNE HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, WAYNE HUNTSMAN did cause Jimmie Mason to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programs in which Jimmie Mason stated and represented that for the crop year 1985 Jimmie Mason would be a producer in a farming operation in which Huntsman Farms, Inc. was the operator, whereas, in truth and fact, as WAYNE HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

COUNT VII

That on or about June 20, 1985, in the Eastern District of Arkansas, RALPH HUNTSMAN willfully and knowingly did cause to be made a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money under Sections 714 to 714p, Title 15, United States Code, and the Agricultural Act of 1949 in that, for the purpose of obtaining 1985 Rice Diversion and Deficiency Program payments, RALPH HUNTSMAN did cause L. E. Jack Parks to submit to the White County, Arkansas, office of the Agricultural Stabilization and Conservation Service a Contract to Participate in Price Support and Production Adjustment Programming which L. E. Jack Parks stated and represented that for the crop year 1985 L. B. Jack Parks would be a producer in a farming operation in which Huntsman Farming, Inc. was the operator, whereas, in truth and fact, as RALPH HUNTSMAN then well knew, Huntsman Farms, Inc. would be and was the true producer and operator, all in violation of Section 714m(a), Title 15, United States Code, and Section 2, Title 18, United States Code.

A TRUE BILL.

_____

FOREMAN

CHARLES A. BANKS
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UNITED STATES ATTORNEY/ASSISTANT
ROBERT L. NEIGHBORS
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501-378-5342
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	)	
	)	
V.	)	No. LR-CR-88-151
	)	
WAYNE HUNTSMAN	)	
RALPH HUNTSMAN	)	

BILL OF PARTICULARS

Comes the Untied States of America and for the bill of particulars ordered by the court states:

1. At the trial of this case the government will claim that Bill C. Long, Jimmie Mason, L.E. Jack Parks, Roy Crowder, Tom Wachtel, Scott Wachtel and Jared Fears were co-conspirators with the defendants in this case.

2. Employees of the Agricultural Stabilization and Conservation Service were present during certain of the acts listed in the indictment. These individuals were Neal Gregory and Irene Winchester.

3. The Agricultural Act of 1949 originally established the Commodity Credit Corporation. Sections 714-714p, Title 15, United States Code, create and set for the purpose of obtaining money, property, or anything of value under any act applicable to the Commodity Credit Corporation. Section 714m(d) provides that it is a crime to conspire to accomplish any of the acts made unlawful in Section 714m(a).

The false statements described in the indictment were made to circumvent the definition of the term "person" found in the Code of Federal Regulations. The applicable section is 7 C.F.R. § 795.3 for the years 1978 through July 14, 1987. That section is now 7 C.F.R. § 795.3(b). Copies of the amendments to 7 C.F.R. part 795 from 1978 to the present are attached.

Section 1101(1) of the Agricultural Act of 1981 provides that the total amount of payments, excluding disaster payments, which a person shall be entitled to receive under one or more of the annual programs of wheat, feed grains, upland cotton, and rice for each of the 1982-1985 crop years shall not exceed $50,000. The Food Security Act of 1985 amended the Agricultural Act of 1949 to authorize price support, payment, and production adjustment programs for the 1986-1990 crops of rice, upland cotton, feed grains, and wheat. Section 1001 of the Food Security Act provides that the total amount of payments, excluding disaster payments, that a person may receive in accordance with one or more of the annual programs, may not exceed $50,000. Note: The Agricultural Act of 1981 amends the basic legislation, the Agricultural Act of 1949.

WHEREFORE, the United States prays that the court find that it has complied with its order for a bill of particulars.

Respectfully submitted,
CHARLES A. BANKS
United States Attorney
/s/
By ROBERT L. NEIGHBORS
Assistant U.S. Attorney
P. O. Box 1229
Little Rock, Arkansas 72203
(501) 378-5177

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed to the defendants attorneys, Mr. Samuel A. Perroni, 10810 Executive Drive, Suite 215, Little Rock, Arkansas 72211 and Ms. Roxanne Wilson, P. O. BOx 71, Little Rock, Arkansas 72203 on this 7th day of August, 1989.

/s/
ROBERT L. NEIGHBORS

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

No. 92-200

In the Supreme Court of the United States

OCTOBER TERM, 1992

WAYNE HUNTSMAN AND RALPH HUNTSMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

In the Supreme Court of the United States

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WAYNE HUNTSMAN AND RALPH HUNTSMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the United States lacks statutory authority in a criminal case to appeal an order granting a motion for a judgment of acquittal following a jury verdict of guilty, and that the court of appeals erred in reversing the district court's order in this case.

1. On December 13, 1988, petitioners, the operators of a farming enterprise called Huntsman Farms, Inc., were indicted by a grand jury sitting in the Eastern District of Arkansas. They were charged with six substantive counts of causing tenants of Huntsman Farms to make false statements for the purpose of influencing the Commodity Credit Corporation to pay federal farm subsidies, in violation of 15 U.S.C. 714m(a); and with conspiracy to commit the false statement offenses, in viola-

tion of 15 U.S.C. 714m(d). Pet. App. D1-D7. Following a jury trial, petitioners were convicted of the six substantive counts but acquitted on the conspiracy count.

On June 10, 1991, the district court granted a postverdict judgment of acquittal on the substantive counts on the ground that the evidence was insufficient. The court also held that there was a fatal variance between the charges and the proof. Pet. App. C1-C19. The district court concluded that while the indictment charged that the tenants had made false statements misrepresenting their status as "producers" in order to qualify for farm subsidies, the proof at trial focused on whether the four tenants qualified for subsidies as "separate persons." The district court found the evidence insufficient because, under the lease agreements with Huntsman Farms, the tenants were contractually bound to share the risks and entitled to share the proceeds from farming operations on the leased land.

The government appealed, and the court of appeals reversed. Pet. App. A1-A18. The court found that the indictment gave petitioners notice that the prosecution would try to prove that their tenants misrepresented their status as producers, and that there was no fatal variance between the indictment and the proof. The court of appeals also found the evidence sufficient, concluding that the tenants' statements were false because none of the tenants qualified as producers who were entitled to share in the crops, either because they did not farm the leased land or because they did not share in the risks and benefits of farming the land.

2. Petitioners contend (Pet. 9-14) that the government has no statutory authority to appeal from a postverdict judgment of acquittal. The Court rejected that argument in *United States* v. *Wilson*, 420 U.S. 332, 337 (1975), where the Court held that 18 U.S.C. 3731 gives the government the right to appeal a post-trial order

overturning a jury's verdict. See also *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 567 n.4 (1977); *United States* v. *Scott*, 437 U.S. 82, 91 n.7 (1978). Every court of appeals that has addressed the issue has followed this Court's decision in *Wilson* and held that the government may take an appeal from a post-verdict order of dismissal or judgment of acquittal.[1] There is therefore no reason for the Court to reconsider this settled question.

3. On the merits, petitioners contend (Pet. 15-23) that they were convicted of different offenses than those charged in the indictment or described in the bill of particulars and that the acts they were alleged to have committed did not fall within the reach of the statute under which they were charged. Whatever the merits of petitioners' contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioners in the same position they would have occupied if the district court had denied their post-trial motion for judgment of acquittal and dismissal of the indictment. If, upon review of the final judgment, the court of appeals reverses petitioners' convictions, petitioners' present claims will be mooted. If, on the other hand, the court of appeals affirms their convictions, petitioners will then be able to present their current contentions to this Court, together with any other claims they may have, in a peti-

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[1] See, *e.g.*, *United States* v. *Singleton*, 702 F.2d 1159, 1161-1162 (D.C. Cir. 1983); *United States* v. *De Garces*, 518 F.2d 1156, 1159 (2d Cir. 1975); *United States* v. *Dixon*, 658 F.2d 181, 187 (3d Cir. 1981); *United States* v. *Steed*, 674 F.2d 284, 285 (4th Cir.), cert. denied, 459 U.S. 829 (1982); *United States* v. *Cardenas*, 748 F.2d 1015, 1023 (5th Cir. 1984); *United States* v. *Klein*, 910 F.2d 1533, 1535 (7th Cir. 1990); *United States* v. *Sharif*, 817 F.2d 1375, 1376 (9th Cir. 1987); *United States* v. *Quarry*, 576 F.2d 830, 832-833 (10th Cir. 1978); *United States* v. *Greer*, 850 F.2d 1447, 1449 (11th Cir. 1988).

tion for a writ of certiorari seeking review of the final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

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[2] Because this case is interlocutory, we are not responding to petitioners' challenge to the court of appeals' ruling on the merits. We will file a response on those issues if the Court requests.